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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHELDON G. ADELSON,

Plaintiff,

v. 12 CV 6052 (JPO)

DAVID A. HARRIS, MARC R. STANLEY and NATIONAL JEWISH DEMOCRATIC COUNCIL,

Defendants.

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New York, N.Y.
December 17, 2012
2:30 p.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

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(Case called)

THE COURT: Good afternoon, everyone. We're here for argument in this case on defendants' motion to dismiss. I realize I didn't give you all much guidance about the focus of the argument. I will give you a little more now, but not too much more. I don't think I need to hear much about the motion to strike, that's going to be -- well, I think there's a good chunk of that that may become irrelevant depending on what are the bases for my ruling, what law applies, et cetera, but I don't think that I need to you focus on that today. I think I will end up probably taking judicial notice insofar as I reach the issue of the fair and accurate part of a judicial proceeding, take judicial notice of filings in the court, but I think a lot of other stuff will probably be extraneous and ultimately irrelevant for the purpose of the motion. So I don't think that I need you to talk much about the motion to strike.

I am interested in the choice of law issues, and I'm interested in -- I have some questions about the D.C. Anti-SLAPP law, but I don't want you to -- I have read Judge Wilkins' opinion in the district court in D.C., and I don't want you to get into all the Erie issues and Hanna issues. I realize those issues percolating, and in fact the only real question I have about that, which I will ask you now, is when is the argument in the D.C. Circuit in the Sherrod case, if you

all know?

MR. LEVINE: March 15, your Honor.

THE COURT: All right. And one thing I will ask each side to address -- there are so many levels of analysis here, starting with choice of law, before I get to the applicability or not of the D.C. Anti-SLAPP law, but one question on that is whether it makes sense to stay the case pending the D.C. Circuit decision, if I am inclined to think D.C. law applies. I realize in some ways that's strange because the D.C. Circuit doesn't control the Southern District of New York, but given that it involves the application of D.C. statute and interrelationship with federal rules, I think the D.C. Circuit's opinion on the subject might be particularly relevant, but that's only if D.C. law applies. So that's my thought on that. I don't want you to get into any of the nuts and bolts of the issues raised in those cases, but if you have any thoughts about those issues I raised, the kind of procedural issues, you can address them.

The other things I'm interested in are the fair and accurate judicial proceeding doctrine privilege, and the opinion and fair comment issues. Then sort of related to all of those latter three issues, the issue of hyperlinking, which I was surprised to see how little case law had been cited by the parties on the issue of hyperlinking, but my initial sense is that turns out to be a very important issue in this

particular case.

So those are my kind of initial guiding thoughts. And with that having been said, I will turn it over to Mr. Berlin, or Mr. Levine, since you're the movant I will let you go first.

MR. LEVINE: All right, your Honor. I have to say that it is with some mixed emotion that I hear you do not want to hear argument on the Shady Grove issue, because that made all of our heads hurt.

THE COURT: You said you're happy or not happy?

MR. LEVINE: I have mixed emotions.

THE COURT: I feel bad. I should have told you that about a week ago, but I spent more time going over the stuff the past weekend than before a week ago. So I wish I could have given you more guidance earlier, but that's the way it goes sometimes.

So if you want to highlight any particular issues that aren't in your briefs, of course, you are welcome to do that, but you otherwise you should assume I read everything your briefs.

MR. LEVINE: If it's all right with your Honor, I thought I would start with the 12(b)(6) portion of the motion first and then move to the choice of law and anti-SLAPP Act issue. And the reason I think I can do that is because on the two substantive issues that your Honor mentioned, the official report of judicial proceeding privilege and the opinion

doctrine, the latter, of course, is governed by the First Amendment, so a choice of law doesn't really get involved there, and the official report of judicial privileges privilege, as I read it, doesn't differ between Nevada and D.C. So I thought I would start there and segue back into choice of law.

THE COURT: OK.

MR. LEVINE: As your Honor knows, there are two issues on the report of judicial proceedings privilege, and that is the attribution requirement and whether the report is a fair and accurate report of the judicial proceeding. I will start with the fair and accurate prong. The petition itself, the operative document that contains the allegedly defamatory statement, says in so many words that: This week reports surface that Adelson "personally approved of prostitution," and the words "personally approved" are quoted and the hyperlink is under the words "personally approved."

Your Honor, that is an entirely fair and accurate quotation and paraphrase from the declaration that Mr. Jacobs submitted in the Nevada litigation. It is very similar, I think, to the affidavit submitted by Mr. DeRoche in the Biro case that your Honor held was accurately paraphrased in the New Yorker article at in the Biro case. I don't think there's any difference between the two, and I can't see how you can argue that that sentence that contains the allegedly defamatory

statement isn't a fair and accurate rendition, including the quote itself, of what's in the Jacobs declaration.

THE COURT: Let me ask you about that. I think in the Biro case, part of what allowed the conclusion, I think, that the fair and accurate report privilege applied was that it was self-consciously cited as part of a judicial proceeding, that the article said in a judicial proceeding so-and-so said whatever. Some of them were a little less clear about how specific the reference to the judicial proceeding was, but in this case it seems that the plaintiff is arguing that part of the problem is in the challenged article it's just referred to as a report. When you get to the hyperlink, you get more detail about the fact that it's referring to a judicial proceeding. And I guess my assumption is that as the doctrine generally applies, if there's a declaration in a litigation that says "John Smith has a loathsome disease" in the judicial proceeding and the article says nothing about a judicial proceeding but simply says "John Smith has a loathsome disease," that's not enough to get you the privilege because there has to be some reference -- maybe I'm wrong about this, but I assumed there had to be some sort of reference to that being an allegation or a statement or somehow connected to a judicial proceeding. Is that accurate?

MR. LEVINE: I think that is accurate. That goes to the second prong, which is the attribution requirement. It's

got to be attributed or fairly implied. The Dameron case in the D.C. Circuit has some good language on that score that what you're doing is quoting or paraphrasing or referring to something that took place in a judicial proceeding. And it is quite right that our petition does not say "according to the declaration." It doesn't say that in so many words.

Our argument is that it does the 21st Century equivalent of that by taking the words in quotes, "personally approved," and hyperlinking to where that language comes from. And if you click on the hyperlink, you get to the AP article which explains in great detail that that language "personally approved," closed quote, comes from the declaration that Mr. Jacobs submitted in the Nevada litigation. And it explains the context of the litigation and explains what the litigation is about. It even includes language from Mr. Adelson's counsel and spokesperson telling the other side of the story.

So I think your Honor was quite right at the beginning, the real question in this case is what's the law with respect to the hyperlinks, and can the hyperlink satisfy the attribution requirement. And you're quite right that the law is very sparse on that specific issue. The only case that we have been able to find that deals with it is the Jankovic case, which happens to be in the D.C. Circuit. And if you are to read that carefully, there's no question that the Court held that it would consider the attribution requirement satisfied by

the hyperlink.

THE COURT: But in that case I think it was one step removed because the hyperlink was to the government source itself, is that right?

MR. LEVINE: That is correct.

THE COURT: And your opponent says that that shows the absurdity of your position because it's like linking to yourself to get the privilege.

MR. LEVINE: But if you look at the Jankovic case and you look at the actual report that was cited to, that's not right. The alleged defamation in the Jankovic case was that the plaintiff had supported Milosevic, and because of that, he was put on this watch list and his bank's assets were frozen. The link was to a list of companies and individuals that had their assets frozen in the former Yugoslavia. There was no statement in that attached link that that had anything to do with anybody's support for or non-support for the Milosevic regime. And in fact, as the Court held in the Court of Appeals decision there was no necessary connection between supporting the Milosevic regime and having your company's assets frozen. But the problem there, it wasn't circular, as the plaintiff claims it is here, the problem here was that this statement that they alleged was privileged was nowhere contained in the government report, not even vaguely, it had nothing to do with it. That's what makes a difference.

THE COURT: That argument makes the hyperlink holding victim, doesn't it?

MR. LEVINE: Well, it's the best we have on that. But we do have a number of decisions in what I argue is the closely analogous area of the opinion doctrine, cases in which the argument being made is the opinion is based on disclosed facts, albeit facts disclosed in the hyperlink.

We cited a number of cases, both in our opening brief and in our reply brief, in which courts say there's now a fairly substantial body of law holding that you can disclose the facts on which an opinion is based in a hyperlink. I call the Court's attention specifically to the Silvercorp case we cite in our reply brief which was handed down a couple months ago in New York Supreme Court, very analogous kind of situation, albeit it in the opinion context where an internet publication stated some very forceful opinions about a company's stock trading proclivities, and it did so by hyperlinking to a bunch of government reports and other raw data from which those opinions were drawn. And the Court quite rightly, I think, held those were the disclosed facts upon which the opinion was based.

There's also law in other areas. There are a number of cases dealing with the issue of click through and browse through licenses where courts basically hold that it's hyperlinking to something that contains terms of use that are

enforceable and are basically the functional equivalent of turning over a ticket when you go on a cruise ship. So I think the body of law is starting to develop that people know what hyperlinks are and they understand they provide the attribution or they provide the information upon which the linked statements are based.

THE COURT: The challenged article existed only on the internet?

MR. LEVINE: Only on the internet. And I think that is a significant point. This is an internet-only publication.

And the other point I make, if you look at the traditional notions of defamation law, this is equivalent to the law that says that you read a headline in conjunction with the body of article, you don't read it in isolation. There's a hyperlink. You divine the meaning of what the statement is from the totality of the publication, which in this case includes the hyperlink. So you're quite right that there is no case specifically on point. The Jankovic case probably technically is dicta, but I think that's the logical application of the attribution requirement in the 21st Century.

Let me just say a quick word about the opinion doctrine. I don't understand the other side to be saying that the rest of the challenged statements that Mr. Adelson's money is tainted and dirty and those sorts of things are not opinion. I think their argument boils down to the suggestion that

because the "personally approved" language cannot be considered in conjunction with the hyperlink then it's an opinion based on undisclosed or omitted facts. I think that's wrong for the same reasons we talked about with respect to the ability to use the hyperlink to find out what that opinion is based on.

THE COURT: I'm trying to understand how -- they cite Milkovich v. Lorain Journal for the proposition that an opinion based on false facts is not protected, essentially. Is that right?

MR. LEVINE: I don't think that's quite Milkovich. Milkovich says that, but Milkovich also says with specific reference to the fair comment, from which the opinion doctrine kind of flows, specifically says that the underlying facts can either be true or privileged. So if the underlying facts are privileged, as they are here, that's our whole argument.

THE COURT: But if I didn't agree with you on -- admittedly the main challenge of the petition, the main challenged writing here, the initial challenged writing references a couple of things, McCain's comments about source of overseas money and the prostitution -- the personally approved prostitution language, and then there's a couple other sort of offhand references about unions and one other one, and then sort of, put together, talks about tainted money. It seems to me a fair reading really focused on the two issues of the source of the money and the prostitution as being the

tainted source. Now if I agree with plaintiff that the personally approved prostitution is not protected, does it follow that the tainted -- does your argument as to your opinion fall within that?

MR. LEVINE: I would suggest, your Honor, that doesn't for the very reason that you just mentioned. Given the importance of protecting expressions of opinion, you have a petition here or a publication here that relies on four separate things for the overall conclusion or opinion that the money is tainted.

THE COURT: And you say the stool still stands with the other three legs, basically?

MR. LEVINE: I think --

THE COURT: With two leg, maybe not.

MR. LEVINE: I don't know. I think it's a continuum somewhere along the line, but if you say I have eight reasons why I think this money is tainted and one or two turn out not to be accurate, I think you would be hard pressed to hold the opinion doctrine doesn't protect that.

THE COURT: But if it were just one, you would agree that the opinion would be based on something that I decided is not privileged, and it's for another day whether that's protected.

MR. LEVINE: I think that's right, your Honor.

Now let me just say one word about the fair comment

privilege, because that will get us into choice of law. The only difference between the fair comment -- and that's the one area that does depend on D.C. law versus Nevada law because Nevada held there is no fair comment privilege, that it's unnecessary given the advent of the opinion doctrine.

The one difference between the fair comment privilege in D.C. and the opinion doctrine is that in D.C. the law is that the underlying facts on which the opinion is based don't have to be set out in the publication if they're otherwise generally available to the reader. So if you look at the Lane v. Random House case or the Coles v. Washington Free Weekly case, you will see in both of those cases the underlying facts on which the opinion was based were not set forth fully in the publications themselves.

The Court in the Coles case said anybody who wants to know more about this can get the transcript of the hearing that the opinion was being expressed about. In the Random House case there was a list of books, and anybody who wanted to could go look at the books to see what Mark Lane actually said about the Kennedy assassination. So if D.C. law applies and the D.C. fair comment privilege applies, the hyperlink issue to some extent goes away if people could go and look -- on the opinion side could go and look at the actual declaration in the Jacobs litigation.

THE COURT: But the fair comment and opinion arguments

apply to the same -- are they alternative arguments or do you need them both?

MR. LEVINE: No, I only need one or the other.

Let me say a word about the second publication, which they call the republication and we call the statement. You're familiar with what I'm talking about?

THE COURT: Yes, it's Exhibit F.

MR. LEVINE: Now they call it a republication, but I think it's important to point out it's not a republication.

THE COURT: The one question I have about it, and I think this is clear, but at the moment this went up on July 11 on the Web site, the petition was no longer available through hyperlink or otherwise.

MR. LEVINE: That is correct, it had been taken down prior to that.

So it is not a republication. We cited in our brief the Goforth case out of the Fourth Circuit that specifically holds that simply referring to a previous publication in a subsequent publication is not a republication for purposes of defamation law. So that should take care of the statement in its entirety because standing alone it has no defamatory content. Even if it was a republication and you look back to the original petition in order to pour defamatory meaning into it, I think the analysis with respect to the petition necessarily governs the statement. If the allegations in the

petition are opinions based on privileged facts, then the reference in the statement back to it would similarly be privileged.

I understand why Mr. Wood included it in the complaint because he think he has better arguments with respect to constitutional malice when you get to the statement, but it has nothing to do with the issue of the original petition. If it's an opinion based on a privileged statement of fact, that is, the fair reporting privilege, then the statement goes the way the petition goes.

THE COURT: Do they have some argument that even though as a technical matter the original petition went away, by that point it was so much in the public eye and was being talked about by so many people that there their republishing language to the effect of "We stand by everything we said," at that point in the context of this article, because it got so much notoriety that the analysis is different, in other words, they didn't have to republish the first thing because it was so ubiquitous at that point.

MR. LEVINE: It seems to me it's not a separate publication. The point is it's not a separate defamatory publication. If we ever get down the road that far we can have some lively debate about whether or not our state of mind with respect to the statement is relevant to actual malice with respect to the case as a whole, but it seems to me pretty clear

that the statement standing on its own two feet is not itself defamatory. And that even if it is, if we win on the petition for the grounds I argued, we have to necessarily win on the statement as well.

I think it's now time to talk about the choice of law.

THE COURT: Yes. And I want to start the choice of law discussion with a quote which I think you'll all enjoy -- you all probably read it -- from Judge Sack. It's actually from Dean Prosser. This is from Sack's defamation treatise, "Choice of law in defamation cases," said Dean Prosser, "is a dismal swamp and filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."

I just thought that would be a good --

MR. LEVINE: I couldn't agree more.

THE COURT: -- overview of our discussion. So however you would like to start on that.

MR. LEVINE: We actually do agree on one thing, and that is that if this Court looks to the choice of law rules of the forum, which is New York, that the choice of law rules of New York say that you look for the state with the most significant interests in the issues that are being litigated.

Now there are a number of different ways to look at it, and courts in this Court and in the Second Circuit have looked at it in a number of different ways. Some courts have

applied this nine-factor test that Judge Kaufman claimed 50 years ago. Some courts have done kind of balancing of the totality of the circumstances, and some courts -- and I think this is important, and I'm going to end with this point -- but some courts, specifically Judge Winter's decision for the Circuit in the AroChem case looks at it on an issue-by-issue basis. I think that's a very important point that I will expand on in a few minutes.

But let's start -- I will do this in three pieces. First I will talk about the nine factors, then I will talk about the other factors that I think necessarily have to be part of the inquiry, and then I will talk about the AroChem decision.

With respect to the nine factors, it seems to me that four of them favor us: The place of emanation was the District of Columbia, the defendant's main office is in the District of Columbia, the defendant's domicile, two of the three, are in the District of Columbia, and the third one's involvement was done when he was physically present in the District of Columbia. The last one that I would argue actually favors us is the ninth one, the law of the forum. Although the forum here is New York, that's very artificial. It's only New York because the plaintiff decided to sue here even though it's conceded by both sides that neither party has any involvement with the forum.

THE COURT: So you think the forum that he chose is not Nevada?

MR. LEVINE: It's definitely not Nevada.

THE COURT: Why isn't it D.C. as opposed to New York?

MR. LEVINE: Because we could have easily moved to transfer this case to D.C. The Davis v. Costa-Gavras case, which is one the leading cases in this field, actually started in the Eastern District of Virginia and was transferred here because that's where the defendants were. I think if you look at the Davis case, we easily could have transferred this case to D.C. but decided not to. It's equally convenient for us to litigate here. But they can't deprive us of getting the benefit of one of the factors by suing in a jurisdiction that is an entire stranger to the proceeding. I think that's a fair and reasonable way of looking at it.

The only factor I think that favors them -- the other factors are all neutral, and I will speak to them in a second, but the only factor is the plaintiff's domicile. And I argue to your Honor that the strength of that factor is watered down in this case for two reasons. One, is it is undisputed that Mr. Adelson has an international reputation. He has international business interests. He has international political interests in Israel and here that he's constantly involved in, and all of that is undisputed. So the fact that he happens to have his principal residence in Nevada I think is

a little watered down here in terms of the significance of the factor.

And the other reason is he chose not to sue there when he could have. It's one thing when you have to go to the jurisdiction in which the defendant lives to file your lawsuit because otherwise you can't get personal jurisdiction, but that's not this case. He could have as easily sued us in Nevada as in New York. I assume his argument with respect to why he has personal jurisdiction over us in New York, which we're not contesting, is because the thing was disseminated here, but that's true of every place in the world.

THE COURT: They say your client has an office here.

MR. LEVINE: And we submitted a declaration from our executive director saying that we don't, and we don't. There's a mailing address for making contributions that was on our Web site that allows people to make contributions to a New York address that actually belongs to a third party, but we do not have an office here.

So the point of all of that is I think that the plaintiff's domicile is not as strong a factor here as it is in a case like the Condit case where the plaintiff was a California congressman, who although he had somewhat of a national reputation at that point, had to run for reelection in California, and that was the important locus of his reputation.

THE COURT: The one thing I will say, I think this is

a hard question and there's the nine factors which sort of cut different ways depending how you argue it, it is true that the second restatement -- there is kind of this old tort default rule focusing on the place of injury or the place of tort which usually ends up being the place of the injury. And to quote the second restatement -- I realize there's cases all over the map and this may be a view that's fading away, but I think it's the traditional default rule, the restatement says when a natural person claims he was defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time if the matter complained of was published in that state, and it was nationally published here.

Here it's funny, you have to have a plaintiff with no particular connection to D.C. except on one theory, which I will get to in a second, and then defendants with no connection to Nevada except they published in all the states. And initially I thought well, maybe the presidential campaign and D.C. makes all the sense in the world, but it's not as though Mitt Romney's presidential campaign was based in D.C., I think it was based in Massachusetts. And there's kind of this overarching thought about it being about D.C. because it occurred in the context of obviously the presidential political campaign advertising, but the alleged defamation is about activities in Macau, which according to plaintiff were run out

of Nevada.

Isn't that what the defamation is about, right?

MR. LEVINE: Three points I want to make sure that I make before I forget them. One is the excerpt you read from the restatement is -- the next sentence, I believe, goes on to say that that's true except when another state has a more significant interest. So it's the rule except when it isn't, and I think it's pretty clear, especially when you look at the cases in this circuit, that when you're dealing with a multistate publication and you're dealing with somebody, a plaintiff, who has a national or international reputation, that it is, if anything, the default rule that the domicile of the place of the defendant, if that happens to also be the place where the alleged defamatory publication emanated from, is the law that you apply. And I think if you look through the cases, you'll find that.

The Machleder case and the La Luna case, two other cases they rely on, very different from this case for two significant reasons; in both of those cases you had plaintiffs who had very local reputations. The plaintiff in La Luna was a nightclub in Miami. It had no reputation or interest outside of Florida. The plaintiff in the Machleder case was a guy who had a business in New Jersey, had no reputation or interests outside of New Jersey. In both of those cases the defendants traveled to the plaintiff's state in order to do the news

gathering that led to the defamatory publications. The CBS crew went down to Miami to film in the nightclub in the La Luna case. In the Machleder case, Arnold Diaz went over to New Jersey to do an ambush interview with the guy on his property. There's none of that here. We haven't gone to Nevada to do anything in connection with this. Our only connection to Nevada is that, like every other state or every other place in the world, someone who had internet access in Nevada could access this.

Now your point about Macau is a good one. I think, fairly read, it seems to me that this publication, this petition is about conduct taking place in two places, D.C. and Macau. The rest of the publication --

THE COURT: What's the conduct in D.C.?

MR. LEVINE: The part of the petition that says the money -- the conclusion that the money is tainted is based on four things, the Foreign Corrupt Practices Act investigation which take place in D.C. by the S.E.C. and the Department of Justice, the Senator McCain statements which took place --

THE COURT: But those aren't the alleged defamation.

MR. LEVINE: No, but as we talked about before, those are part of the basis for the opinion and part of the publication.

And on the Macau point, it is true that in passing, with no factual showing whatsoever, the plaintiff makes the

statement that Mr. Adelson directed all of the operations of the Macau casinos out of Las Vegas. In fact, the whole point of the proceedings that are going on in the Jacobs litigation in Nevada is Mr. Adelson's companies have taken the position that the Macau casinos were not run out of Nevada and therefore Mr. Jacobs can't sue whatever it's called, the Chinese -- Sands China in Nevada.

THE COURT: Is that a personal jurisdiction argument?

MR. LEVINE: I believe it's a personal jurisdiction argument with respect to Sands China. So there's a little bit of situational benefit going on there.

Let me move on just briefly to talk about the AroChem decision, because I think that may be the simplest and I think appropriate way out of the whole morras of all the factors that you take into account. And that is this: In the AroChem decision Judge Winter says you look at choice of law and defamation cases on an issue-by-issue basis, and if the issue you're talking about is a privilege or immunity, then you apply the law of the state in which the underlying allegedly actionable conduct took place, because privileges and immunities are conduct-regulating laws as opposed to causes of action themselves which regulate distribution of loss and that sort of thing.

So if you're talking about a conduct regulating point of law, like a privilege or immunity, then Judge Winter says in

the AroChem case you look at the law of the jurisdiction in which the underlying conduct took place. And you do that because you want people who are publishing or making statements in a jurisdiction to know that they can rely on the law of the jurisdiction that they're in in making those statements.

In the AroChem case, the defendant happened to be in a meeting in California even though he lived in Connecticut and the plaintiff lived in New Jersey or something like that when he made the statement. Nobody had -- neither the plaintiff nor the defendant lived in California. But Judge Winter said nevertheless California law applies because the assertion in that case of a judicial proceedings report privilege is governed by the state in which the conduct at issue took place.

THE COURT: It's interesting because at the highest level what the Second Circuit has instructed the courts to consider is which state has the most significant interest in the dispute. And that's interesting because you might argue let's say D.C. has this stronger protection and Nevada has a weaker protection, you might argue that each state has balanced things as it wants and feels very strongly about that, i.e., maybe Nevada wants to protect its potential defamation victims more strongly, so why should D.C. win out because it protects defendants? I guess Judge Winter has given one answer to that.

MR. LEVINE: That's correct.

Now just a couple of other things about -- if you're

not going to -- if your Honor decides not to go that way and decides instead to do the more traditional multifactor analysis, it seems to me there are additional factors that need to and ought to properly be taken into account in looking at the totality of the circumstances. One is the fact that we have virtually no connection with Nevada other than the fact our publication happened to be disseminated there or gathered from there in addition to everywhere else in the world.

The second is Mr. Adelson does have substantial connections to D.C. He is not a stranger. In connection with our reply brief, we have submitted evidence demonstrating that he has donated tens of millions of dollars to political action committees that are headquartered in the District of Columbia and do their political advertising from D.C. He engages in lobbyists who lobby on his behalf in D.C. He sits on boards of organizations in D.C. All of those things, it seems to me, are fairly considered in the analysis.

That is pretty much all I have to say on choice of law. Would you like me to move on and talk a little bit about the statute or are you OK on that?

THE COURT: One question I will ask before I forget is the D.C. SLAPP statute provision of essentially requiring likelihood of success before discovery except that the judge has discretion to order discovery, sort of like the old 56(f) situation, are other statutes -- I think your brief says

California has a similar statute. Other states' anti-SLAPP statutes, do they impose a similar standard?

MR. LEVINE: Many of them do. The D.C. statute is modeled on the California statute, and the California statute is the oldest and has the richest body of case law and definitely has that provision in it.

THE COURT: And that's been around for a long time.

MR. LEVINE: Yes, it has. And I view that, your Honor, as no different than, as you said, the old 56(f), which is now 56(e), I think.

THE COURT: Yes.

MR. LEVINE: It really is no different. And I know you don't want me to wade into Erie and Hanna, but the fact of the matter is there's nothing in the D.C. act that says that in deciding the likelihood of success on the merits prong the Court is supposed to make credibility determinations or resolve disputed issues of material fact or any of those things, it just says that the plaintiff has to show likelihood of success on the merits.

And in California specifically, courts have generally ruled that that means you don't decide disputed issues of material fact, you treat it like a summary judgment motion and you credit the undisputed fact that the defendant submits and resolve disputed issues of material fact in favor of the non-moving party. So in our view there's no necessary

collision between those two things, and for purposes of the discovery provision, it would be treated just like Rule 56(e) now. If we had an issue before you that needed discovery in order to be resolved, I would expect Mr. Wood to say: Excuse me, your Honor, we need targeted discovery to be able to deal with this issue. And your Honor would probably grant it if it was an issue that dealt with this potentially disputed issue of material fact.

But the fact of the matter remains that the issues that we have raised are issues of law that are routinely decided by courts on Rule 12(b)(6) motions and on summary judgment motions without looking to disputed issues of material fact, the opinion doctrine and the fair report privilege, whereas you said at the outset, you can take judicial notice of the fact that the Jacobs declaration exists and that it says what it says.

I should say one quick word, your Honor, about the 7th Amendment issue. I don't know if your Honor is inclined to take that argument seriously, but if you are, there is the issue of Rule 5.1 of the Federal Rules that would require you to certify the issue to the D.C. Attorney General so that he could have an opportunity to weigh in in support of the constitutionality of the statute.

For all the reasons I mentioned, I don't think there's a serious --

THE COURT: Tell me about that again.

MR. LEVINE: Rule 5.1 of the Federal Rules requires that when a litigant has put into dispute the constitutionality of a state statute, first, the plaintiff has to give notice to the Court and to the attorney general of the state that that's happening, and Mr. Wood has done that here. And then your Honor, if you are inclined to take the issue seriously, has to certify to the attorney general -- you have to certify it to the attorney general of the state. And D.C. is a state for this purpose under Rule 81. You have to give the attorney general the opportunity to intervene and support the constitutionality of the statute.

Now we don't think there's a serious 7th Amendment issue here for the very reasons that I just mentioned. There is no necessary finding here in this case that every application of the D.C. Anti-SLAPP Act statute is unconstitutional because it encroaches on 7th Amendment rights. None of the issues that are before the Court on this SLAPP motion at this time implicates 7th Amendment rights.

So facial challenges, as your Honor knows, is only well taken when there is no conceivable basis on which the statute could be constitutional, and we happen to have here at this point on this motion a totally constitutional application of the statute because nobody is asking you to resolve disputed issues of material fact. So I don't think there's a serious

7th Amendment issue.

THE COURT: And does the Rule 5.1 issue apply only to the 7th Amendment issue or does it also apply to the Hanna, Erie rules issue?

MR. LEVINE: On its face, it only applies to the constitutional issue. I know in other cases like the Sherrod case in which both issues have been raised, the D.C. Attorney General has in fact intervened and argued both issues.

And then I guess the last thing I will say, unless your Honor has any questions, is on your suggestion about effectively staying your ruling on this until the Sherrod decision comes down. We would have no objection that so long as your Honor recognizes that the issue in Sherrod isn't exactly the same as the one here, it's at issue whether the statute applies retroactively.

THE COURT: Does it necessarily raise this issue, or it might go away without addressing it?

MR. LEVINE: It might go away without addressing the issue. It's conceivable.

THE COURT: OK.

MR. LEVINE: Thank you, your Honor.

THE COURT: Mr. Wood?

MR. WOOD: Your Honor, if you would indulge me, I would only like to speak for three or four minutes and then Mr. Grunberg will do our argument.

THE COURT: That's fine.

MR. WOOD: Once I realized I would be dueling with Mr. Levine and your Honor over issues dealing with Erie and Hanna and Shady Grove about 36 years out of law school, I bailed, and I asked Mr. Grunberg if he would please take over the bulk of this argument, and I appreciate your indulging me only a few minutes.

One of the reasons I wanted to speak briefly is because I represented Gary Condit in the Condit v. Dunne case before Judge Peter Leisure. And Gary Condit was a twelve-term congressman from California serving in Washington D.C. And prior to the unfortunate tragedy dealing with Chandra Levy, Congressman Condit was speculated as a potential candidate for Vice President of the United States. He clearly, by the time of Mr. Dunne's comments, not only had a national reputation from his political career, but he had unfortunately a national reputation from the spotlight that was cast upon him in connection with the Chandra Levy investigation. Mr. Dunne's comments in Washington, D.C. and in New York and in California addressed alleged conduct after Mr. Condit had become a figure of notoriety with respect to the Levy case.

Despite the fact that the allegation of defamation addressed conduct that occurred allegedly in Washington, D.C. where it was alleged that Mr. Condit had gone to Middle Eastern embassies and solicited the favors young ladies brought there

to satisfy the nocturnal pleasures high-powered folks and politicians, and despite the fact it was alleged that the defamation was Mr. Condit's instructions in Washington, D.C. for someone at the Middle Eastern embassy to kill Chandra Levy, and that the first tale bearer said she was taken from Washington, D.C. in an airplane and her body dropped in the Atlantic Ocean, that the defamation centered on acts in Washington, D.C. Mr. Dunne was a resident of New York and had in fact broadcast the comments on the Larry King Show having earlier broadcast them on the Laura Ingraham Show in Washington, D.C. and having gone to a couple of cocktail parties, small groups of people, and telling the story again, the horse whisperer story.

Judge Leisure correctly ruled that under those circumstances, Gary Condit was entitled -- despite filing suit in New York against a New York resident -- to have the law of California apply for the very reason that the default rule applies. That is clearly the jurisdiction in a multistate defamation case where the bulk or the greatest amount of damage is done to the person's reputation.

And without trying to take away a point Mr. Grunberg may very well make, it is important not to get sidetracked, in my view, on these arguments about politics. The defamation in this case is not political. The defamation in this case is personal and it's professional. The defamatory statement at

issue in the core of this case is Sheldon Adelson, quote, unquote, "personally approved a pro-prostitution policy with respect to his businesses." That is a personal attack against his reputation, it is a professional attack on his business reputation. The National Jewish Democratic Council, for their own reasons, chose to take that personal and professional accusation against Mr. Adelson and use it for their own political purposes to go out and raise money and to perhaps also damper the fund-raising activities of Mr. Romney and other candidates. They made it political. It was not a political decision.

And because they chose to make it a personal approval, they transformed that person into the person of Sheldon Adelson. This is not a lawsuit brought by Sands of China with an argument of well, it was business decisions with respect to Macau made by the board of directors in Macau. It doesn't matter what that relationship is vis-a-vis the Nevada litigation, they said that Sheldon Adelson personally approved it, a man who lives in Nevada, a man who makes his income in Nevada and a man who operates as the CEO of the corporation in Las Vegas that owns Sands Macau. And given that, as Mr. Grunberg will more articulately state, I believe the choice of law real clearly is the default rule.

One last comment, and I do think it's important because there are issues of hyperlinking which I find very

novel, and I would love to have made the comments about fair comment and opinion, but once I decided to bail on the Erie and the Hanna and the Shady Grove, I don't think it's fair for me to try to restore my right to make those arguments. I will let Mr. Grunberg do it. He deserves it, and he will do a fine job.

But I do think that when you look at this issue of hyperlinking, if you look at the real world, and if you look at how the doctrine of privilege applies to statements in a judicial proceeding, the National Jewish Democratic Council made a conscious decision not to attribute it. If they wanted the privilege, Mr. Levine could have easily told them how to get it, without any doubt about it. They could have attributed it directly.

But they chose to attribute it, I believe it is reasonable to infer, because they didn't really want the readers and the people they wanted to motivate with their political agenda to really realize this was a statement made in litigation by a disgruntled former employee that was adamantly denied as true. They wanted to blanket it with some element of truth greater than it deserved, so they choice to call it reports, plural; not one, they said reports twice, plural. And then they hyperlinked it not by giving the link that would have -- as you ordinarily see on the internet, they hyperlinked it by putting quotes around "personally approved" and underlining. The average reader might have thought that was

for emphasis only. They may not be as internet savvy as some of us.

And that's the other point I wanted to make. What Mr. Levine wants is he wants the ability to have the privilege that he did not attribute it to bestowed upon them because he hyperlinked to an article that correctly described with privilege the false statement of Mr. Jacobs.

THE COURT: I was going to ask you about that. So you concede that the AP article itself, standing by itself, could assert -- if this were a suit against AP, they could assert the privilege.

MR. WOOD: Absolutely. Absolutely. But they want to now take advantage of the AP's privilege because of this hyperlink, and they're asking you not only to give them the advantage of that, they're asking you to do something very, very important, they're asking to you assume, to assume that the average reader would go to that hyperlink. That is not an assumption that I believe legally they are entitled for this Court to give them the benefit of. Some people might do it. Many, I believe in the real world, would not.

And without that benefit of that assumption legally they're asking you for, then the hyperlink theory goes away. And this article stands as classic defamation law has stood since I have been involved in it. Your decision will turn on the four corners of that article, and you will not assume that

a reader -- to steal Mr. Grunberg's line, you will not assume that a reader -- the average reader is also a researcher.

Those are the remarks that I wanted to make, your Honor, and now I will turn it over to the expert.

MR. GRUNBERG: Your Honor, I will start with choice of law rather than follow the road map that defendants did, and then I will turn to the traditional 12(b)(6) issues that we have here starting with fair and accurate report of judicial proceeding, moving to opinion and then fair comment.

So as Mr. Lin framed it for us pretty well, when we're talking about choice of law, we're talking about defamation against a Nevada businessman for conduct that he does in Nevada where he earns his living, and we're not talking about conduct of Mr. Adelson that occurred in the District of Columbia. And that's just clear. Any of this other ancillary political activity just isn't an issue in this case. The heart of this case is the defamatory and false statement that Mr. Adelson personally approved. Indeed, that's the heart of our theory on opinion. The theory on opinion isn't about an S.E.C. investigation or anti-union activity, the theory on opinion is there is a false basis there, and that false basis is that Mr. Adelson personally approved of prostitution is false and defamatory, and that false and defamatory basis cannot be one of the legs of the stools for their opinion.

I will get to that argument later.

THE COURT: Of course, the only reason the defendants NJDC were talking about the prostitution issue was because of the political contributions. Otherwise, presumably they wouldn't have cared. In other words, it was only a subject of publishable interest to them, I think, because of the campaign, because of his contributions to the campaign, right?

MR. GRUNBERG: You're to speaking to one of the reasons why Sheldon Adelson is well-known, international figure. But the fact of the matter remains -- and we'll tie this back once I get to the nine-factor test for you -- it's the conduct that's at issue here, and the nine-factor test looks at the conduct of the plaintiff that's at issue. So when the defendant attacks the plaintiff because of something the plaintiff did, we look at where the plaintiff did that thing.

In this case, the accusation is that plaintiff personally approved of prostitution. And where he would have done that, and the injury, all of this centers in Nevada. And again, I think as Mr. Wood pointed out, the charge isn't that -- the allegation here in the petition is the defamatory statement isn't that Sands China approved of prostitution, it's that Mr. Adelson personally approved prostitution. Mr. Adelson lives in Nevada, he works in Nevada, he makes his money in Nevada, he is a Nevada citizen through and through.

But to turn, if I can, to the kind of more structured approach to all of this, as I already pointed out, the key here

is which state has the more significant interest. There are a multitude of ways to approach this issue. One is the nine-factor test, the other is looking at the restatement -- and in the multistate context, we're talking about restatement Number 150 -- or a kind of ad hoc approach which seems to be more like what the defendants did where you're kind of grabbing for defendants what are favorable factors all over the place and creating new rule out of whole cloth.

In terms of the nine-factor test, contrary to what the defendants said, the factors point to Nevada. We have the plaintiff being -- the first factor, plaintiff is domiciled in Nevada. The second factor, plaintiff's principal activity is based in Nevada. Third factor, the plaintiff suffered his greatest harm in Nevada. That's where he learned his living. That's where he has to get licensed for his casinos. That's where he built his fortune, that's his personal and business reputation, clearly the area of greatest harm. Four, publisher's domicile and incorporation. That's D.C. Defendants' main publishing office is D.C. Principal circulation, world-wide, place of emanation, D.C. and where liable to be seen, world-wide.

What we have here, to really break it down and try to give some meaning to these factors is the only three factors that point to the defendants' state, not really D.C., are publishers domiciled, the main publishing office, and the place

of emanation, they're all factors that ask about defendants' relationship to the case, but none of the factors that would show some sort of outside conduct, such as where plaintiff suffered greatest harm. None of those go to D.C. All the factors that basically ask where is defendant located obviously go to D.C., but none of those other external factors go anywhere else.

And when you have that simple conflux of factors, only those three factors that say the defendant is located in D.C., published in D.C., emanated from D.C., that has never been enough to then subject a plaintiff to the law of defendants' domicile, with the only close exception -- it's still wasn't enough, it was Davis v. Gavras, but hasn't been enough.

The question here is: Do you let a defendant come and infiltrate Nevada, attack Mr. Adelson in Nevada, and then drag Mr. Adelson back to the District of Columbia and make him fight there? There is a notion even in Davis v. Gavras that there has to be justice when determining choice of law, and that is not justice in choice of law.

THE COURT: What about the fact that you did choose to file -- Mr. Adelson chose to file in a place other than Nevada?

MR. GRUNBERG: So Mr. Adelson's choice -- and that is the ninth factor. The way that defendants have portrayed this is that we're somehow manipulating the ninth factor by coming up here and filing here, but that's just not the case.

Nevada -- the reason why we didn't file there is there are concerns about getting minimum contacts in jurisdiction over the defendants there.

We have internet conduct, and as you can see when we're talking about internet conduct, the law isn't quite robust yet, so there are certain issues, and D.C. is obviously where they're based, and that's not necessarily neutral ground. We're coming up here in New York where their Web site says that -- defendants' Web site said they have they had a New York office and provided an address for that office. So we figured there would be jurisdiction here. There's a great body of law here, great judges here, and this would be the place to try the case.

THE COURT: I'm not going to argue with the great judges.

MR. GRUNBERG: Of course, they didn't contest personal jurisdiction, and the time to do that has passed. They're obviously happy enough to be here, and we certainly are as well.

Now the nine-factor test -- so the majority -- at least the three factors go towards it being Nevada, and those three factors are particularly important because it shows where the harm to the plaintiff is, and that's really an overriding concern whether you go with restatement 150 or the nine-factor test, where is the harm to the plaintiff. That's what we're

getting at when we say the default rule is you go with the law of the plaintiff's domicile, because that is -- in a sense, the harm makes the locus of the tort the plaintiff's domicile.

Even if you turn to, say, an issues-based approach and using restatement 150, nevertheless the law should still be the District of Columbia -- sorry, should still be Nevada. What they tried to do with this issues-based approach is bring in AroChem. And AroChem said that when you're looking at an issue of privilege or immunity that you look -- you apply the law of the state of defendant's domicile because that state would have the greater interest.

Now first issue with that is that the D.C. act is neither a privilege nor an immunity. An immunity is basically a protection that is given to a defendant who has otherwise acted tortiously. So if a defendant defames the plaintiff and would be liable for that defamation, what that privilege or immunity does is say even though all those elements have been fulfilled for liability, for defamation, nevertheless that statement is privileged and the defendant would be immune from liability.

The Anti-SLAPP doesn't do that. The Anti-SLAPP never removes the duty of the defendant to cease from defaming. The Anti-SLAPP simply rewrites the procedures for adjudicating pretrial whether there's been defamation but never takes away that duty from the defendants. The defendants always have that

duty to cease from defaming. The defendant will be liable for his defamation if indeed he defamed the plaintiff.

In fact, 3M Co., which you're greatly familiar with, noted at the end of the case that the defendants in that case tried to masquerade the D.C. act as a substitute immunity, and the court wasn't buying it. It's simply not. So AroChem and its progeny, Goldstein and Bio/Basics, all of these cases don't even apply because this isn't a privileged immunity. And second, AroChem actually says that for a loss allocating rule, which is an immunity-type of rule, that you don't need to go with the law of the defendant's domicile.

Let me make this clear for you. Part of where this idea of that you -- for an immunity and privilege you go with the law of the defendant's domicile, that comes from Schultz v. Boy Scouts of America. In Schultz, the court draws a distinction between conduct-based rules and loss-allocating rules. And the court says that in the instance of conduct-based rules that maybe the defendant's domicile has a greater interest because the defendant's domicile has an interest in regulating the conduct of its citizens. And then for loss-allocating rule, that interest is no longer present. And when AroChem enumerates the different types of rules that would fall under loss-allocating rules, specifically the court says immunities.

Now for some reason, courts have since really lost the

seed of that law, and this privilege and immunities notion has been taken elsewhere, but even when these other courts have done it, for instance in Bio/Basics, Bio/Basics basically acknowledged it had very little authority for doing what it was doing in applying the law of the defendant's domicile to initial privileges and immunity. And at any rate, ultimately Bio/Basics went with the plaintiff and applied the law of the plaintiff's domicile despite some potential interest that D.C. had in applying its laws to conduct that occurred in D.C.

Indeed, it's interesting, as for other cases that are in defendant's reply brief on this issue of privileges and immunities, such as Block and Carolco which come out of the Ninth Circuit, those courts were applying California standards for choice of law, not even applying New York standards, and the California standard is very different.

Now returning to this notion of the restatement -- and we're still here talking about issues -- what the restatement says is the state with the most significant relationship with plaintiffs -- with the most significant relationship to the issues and the parties should have its law applied. In this case, D.C. doesn't have a relationship to all the parties. D.C. has a relationship to one party, defendant. But in terms of the relevant conduct at issue here, D.C. has no relationship to Mr. Adelson. But D.C. -- sorry, Nevada has a significant relationship with both Mr. Adelson and with defendants.

Defendants affirmatively chose to publish their defamatory petition online knowing that that information would infiltrate into Nevada as if they were handing out pass bills on the street in Nevada. They were present there.

THE COURT: Does Nevada have an interest of law?

MR. GRUNBERG: They do. Nevada's Anti-SLAPP law is more geared to towards the right to petition.

THE COURT: Like New York.

MR. GRUNBERG: Like New York. It's not nearly as broad as the law here. What you pointed to, and I thought this was a great point, say if we return to this interest issue, Nevada has an Anti-SLAPP and D.C. has an Anti-SLAPP, and both states have an interest in enforcing their own laws on these issues of Anti-SLAPP. Obviously Nevada chose to draw a line in a very different place because they found value in preventing certain defendants from freely defaming a certain class of plaintiffs and chose to draw the line in a different place than D.C. did.

Now there's no reason to give D.C. some sort of primacy over Nevada's Anti-SLAPP. Those interests essentially cancel out, which is Condit did something very similar in that when deciding whose law to choice. Condit basically canceled out the interest of New York and canceled out the interest of California in the court and said really we're not going to look at that.

Now that pretty much highlights -- let me double-check here to see if there's anything else I had.

I want to make clear that in defendants' relying on Machleder and La Luna, defendants are trying to make a point; Machleder v. Diaz and La Luna Enterprises v. CBS Corp. In those cases the courts didn't set a floor as to when it would be necessary to apply the law of defendant's domicile. They didn't say that if you have factors five through nine you must apply defendant's domicile. So even though all the factors that were present in Machleder and La Luna might not be present here that would favor Nevada, nothing in those cases say that the fact that one or two of those factors are present is sufficient go with D.C.

Just review my notes to make sure that we're good on choice of law.

THE COURT: I guess this isn't a choice of law question, but the other question to make sure I don't forget is the fair and true report of a judicial proceeding privilege essentially applies equally whether it's D.C. law or Nevada law. Do you agree with that?

MR. GRUNBERG: Nevada law has a fair report of judicial privilege. I don't want to make any sort of representations right now as to the scope of that law. It's not at issue yet in the case, and it indeed might end up being in issue. It looks like now we're dealing with what they

briefed, which is the law in the District of Columbia. But I certainly would be happy to get back to you about the scope of the fair report of comment privilege in Nevada.

THE COURT: Well, if I decide that Nevada law applies -- I'm trying to also understand procedurally what was bifurcated. If I decide Nevada law applies, the issue of the fair report of judicial proceeding has been briefed, right?

MR. GRUNBERG: It essentially has, and it is essentially the same. The issue of fair report of judicial proceeding is essentially the same in Nevada.

THE COURT: So what has been put on the second part of the bifurcation?

MR. GRUNBERG: So the second part of the bifurcation is in the D.C. Anti-SLAPP the plaintiff ends up having the burden of showing likelihood of success on merits on the plaintiff's claim. So what that would mean is we would have to go through each individual element. So we would have to prove that it's defamatory, that it's false, without privilege, actual malice, damages. And we have carved that out for a later time and agreed that right now what we're dealing with in terms of merits of the claim are the three 12(b)(6) issues.

THE COURT: Thank you for reminding me. I think you've made your position clear on the choice of law issue. I'm still not sure how I'm going rule on that, but I will obviously spend some more time with the cases. But maybe you

could turn to I guess the fair and accurate report of a judicial proceeding issue. And I guess one question I have for you is this: I'm still interested in this hyperlink issue, and since you agree that the AP article to which the challenged article was linked is OK -- I mean it's not challengeable by virtue of the fair report privilege, but you said that there's enough of a difference between the linked article and the petition that it doesn't get the pass through of the benefit of the fair report privilege.

I guess what if the article -- what if the petition were printed on a Web site and then said see below, there's an asterisk instead of a hyperlink, and then at the bottom of the page was a reprinting of the AP article, if the AP article were simply printed below, how would that change the analysis? Do you think there would still be a defamation claim on the petition, or would that be a closer nexus than a hyperlink and therefore a different conclusion?

MR. GRUNBERG: That would bring the underlying hyperlinked information up into the four corners of the document itself and it would be on the face of the document, and likely that would fulfill the fair and accurate report of judicial proceeding. You would still have potentially some issues of opinion, there could be certain issues, but you would at least bring it up to the face of the page and put it in the four corners so anyone who reads that document has a fair

chance to then read the full report of what occurred in the judicial proceeding.

That's a very different circumstance than what we have here. What we have here is by hyperlinking, as Mr. Wood pointed out, it's all together likely that you will have someone open up that Web page, read that petition, and just move on without hyperlinking or not realizing that there's hyperlink, or decide what they wanted to do was print out that Web page to read it later to take with them on the train or print out that Web page and give it to a friend. So defendants quickly lose control over how the reader would actually interact with the Web page.

THE COURT: One of the cases that you cite in your brief is a D.C. Circuit case of Dameron v. Washington Magazine, and that case sets the standard and describes the standard as the following, "It must be apparent, either from the specific attribution or from the overall context, that the article is quoting, paraphrasing or otherwise drawing upon official documents or proceedings."

Why isn't overall context sufficient to something like a hyperlink with respect to an online publication?

MR. GRUNBERG: There has to be a place that you draw the line. There has to be a kind of realization that there's only so far that the reader is going to go. So whether or not we want to allow people to make pretty outrageous statements on

the face of a page and then start clicking on hyperlinks in order to support the statement below is the decision that a court needs to make, but it seems like it's not a safe track for defamation law, because you really allow almost any statement to be made on the face of the page and then simply a series of hyperlinks that would somehow be explicatory for the defendants.

And while I could see where you're saying why would you -- why wouldn't that be part of the greater context, it's not part of the greater context because it wouldn't provide sufficient protections for plaintiffs. Defamation law is there for a reason. People have hard-earned reputations, and you need to provide a requisite amount of protection.

THE COURT: Then you also complain about the headline and say well, a lot of times they might link to the headline but not read the whole AP article. But the headline itself of the AP article says, if I'm reading it right: Sheldon Adelson approved prostitution strategy: fired former Sands executive. It's true that it doesn't talk about litigation, but it does sort of rope into the title the notion of the disgruntled former employee. It kind of wraps a lot into the title.

MR. GRUNBERG: But it still doesn't speak about a judicial proceeding. And the privilege isn't for a fair and accurate report of what anybody said, the privilege is a fair and accurate report of a judicial proceeding. And indeed, this

point about the headline, it's more a point about analogy. It's saying that there's -- you can't really bury the information that would give you the privilege way under so the reader doesn't read it.

Indeed, this privilege in a sense, it's society striking a balance with people who may be defamed. It's saying that we value a fair and accurate report of the judicial proceeding enough that for individuals who give that fair and accurate report, we're going to give them a privilege to make those statements. But part of that deal is that the publisher then needs to properly attribute those statements to the judicial proceeding, because that's how the reader knows that this information came from a judicial proceeding that should be important to you. And that's just -- this petition utterly failed to do that. It absconded the judicial proceeding through multiple levels, going from petition to a hyperlink to the AP report until you finally might get to the notion there was a judicial proceeding in play.

THE COURT: Let me ask you about the judicial proceeding briefly. The other argument that is sort of in your papers sort of alongside the hyperlink attenuation kind of argument is that this was a source -- this was a sketchy source, you say this was obviously a disgruntled former employee. What is the claim -- I gather you don't challenge that what the AP said is an accurate representation of what

Jacobs says in an affidavit -- it's an affidavit, right?

MR. GRUNBERG: He says in a declaration.

THE COURT: Declaration, so it's sworn, it's effectively sworn, a sworn statement, and therefore more than an allegation, it's under penalties of perjury. So in that sense it's evidence, unlike an allegation in a complaint. I guess is there anything more within what's before me properly that undermines -- kind of makes obviously incredible the statement that is linked to the challenged declaration or the challenged petition?

MR. GRUNBERG: The article has a slew of exculpatory information that isn't at all at play in the Jacobs -- in the petition here. First of all, the article says that Jacobs is a disgruntled former employee who isn't necessarily reliability, and talks about the scenario leading into the time the inquiry was false when he made the statement about the approval of prostitution. But beyond that, I want to touch upon the defendants' reading of Jankovic, because Jankovic does not stand for what the defendant believes it stands for.

In Jankovic, the issue was whether a report which was the defendant's publication sufficiently attributed and gave a fair and accurate account to hyperlinked material. And in that case, the court obviously, as defendants pointed out, found that defendant didn't give a fair and accurate account. But once again, as you acknowledge, the very analysis of trying to

understand whether the report gave a fair and accurate account of hyperlinked material would be an unreasonable thing to do if, as defendants are advocating, the hyperlinked material is part and parcel of the defendant's publication itself. It would be like analyzing yourself.

The Jankovic court didn't do that. The Jankovic court treated the hyperlinked material as a discrete publication that had to be analyzed to understand whether defendant's publication attributed to the hyperlinked material and then gave a fair and accurate report of the hyperlinked material. Those two, the hyperlinked material and the defendant's publication in that case, are not one and the same, as defendants would have you believe here.

THE COURT: OK. Anything more on fair and accurate report or anything that you want to say about the opinion and fair comment issues?

MR. GRUNBERG: Yes, I would love to touch upon both issues, please.

THE COURT: Sure.

MR. GRUNBERG: Now as your Honor has pointed out, there's an issue here with whether hyperlinked material can be pointed -- can be relied upon in the realm of opinion, and indeed, defendants have tried to blur line between those cases that may have held that you can use hyperlinked materials as the basis for your opinion and try to blur the line between

those cases, and the argument that you can use hyperlinked material for attribution in the fair report of judicial proceeding.

Now the first really important thing to point out about these opinion cases that may have looked to the hyperlinked material as the basis, such as Sandals Resorts v. Google, is that those cases are in the context of New York's protection for opinion. New York's constitutional protections for opinion are beyond those of the United States Constitution. And so if the New York State courts had made the decision to blur the line between a defendant's published material and subsequent hyperlinked material, that may make sense in the context of New York's robust protections for opinion, but it does not make sense in the context of your Milkovich U.S. Constitution branch of opinion, which doesn't have the same sort of protection.

Now indeed -- and this goes to defendants' unsubstantiated argument about the legs of the stool for an opinion. Defendants, without giving you any support -- and indeed, this is not stated in their brief -- defendants are arguing when you have an opinion that has multiple bases that even if you take out one of those bases because it's false and defamatory, that the opinion still gets to stand as protected opinion as long as those other legs are still solid. Defendants simply didn't give any support for that statement.

Now in this case, we have one of the bases being for this opinion about dirty tainted money being that Mr. Adelson personally approved for prostitution. Now even if you include the hyperlinked material, one of the legs here, there would be four legs essentially, one of them is still this statement that Mr. Adelson personally approved of prostitution. It's false and it's defamatory. And in fact, even if you go to the hyperlinked material to the AP report to see if the basis would be sufficient to support the opinion, well, the statements in the AP article are also false and defamatory. It just so happens that because the AP article has a privilege, the fair report of a judicial proceeding privilege, that the AP article's utterance of these statements is protected.

But the defendants are trying to stand in the shoes of the AP and use the material from that AP article, which as to defendants, isn't privileged. So their opinion about dirty tainted money has a false and defamatory basis on the face of the petition, i.e., Mr. Adelson personally approved of prostitution has a false and defamatory basis when you go to the hyperlinked material, the statement that Mr. Adelson personally approved of prostitution, and they had no privilege for that statement in the AP article. So that argument about hyperlinked material, even if you buy it, still doesn't account for the false and defamatory basis that's on the face of the petition.

I'm just reviewing your questions with defendants to make sure I cover certain points.

THE COURT: Sure.

MR. GRUNBERG: Your Honor, I will move on to fair comment.

THE COURT: OK.

MR. GRUNBERG: Now here what we need to keep sight of for fair comment is there is no protection for fair comment if the defendant misstates the facts. So while the defendant may be correct that fair comment doesn't always require that the underlying facts be disclosed in the publication, the publication cannot be based on a misstatement of facts. Indeed, the opinions set forth that's protected by the fair comment privilege has to be an honest opinion. So if the defendant is misstating facts, if the defendant's opinion isn't in fact an honest portrayal and based on an honest assessment of the basis for the opinion, there is no protection under fair comment.

And that's precisely what we have here. The opinion or the fair comment of dirty tainted money is based on the misstatement of fact that Mr. Adelson personally approved of prostitution. That is simply not the case. That is a misstatement of fact. Indeed, it is not an honest opinion because defendants know that Mr. Adelson did not personally approve of prostitution, as we alleged in our complaint.

THE COURT: OK.

MR. GRUNBERG: If I may, defendants did venture into the realm of Anti-SLAPP just a little bit.

THE COURT: If there's anything that you would like to respond to, you can. You don't really need to address that right now. But if there's anything -- you don't need to address any of the Anti-SLAPP. I think I have enough materials. I actually have the briefs and the case before the D.C. Circuit, and there are a lot of issues there that I haven't worked out, but first I need to decide the choice of law.

MR. WOOD: I know you need to work them out, but two procedural points. Number one, with respect to the question of the stay, if your Honor concludes that D.C. law applies, then I would concede that judicial economy would probably be best served until we get a decision in hand, if your Honor is inclined to stay the case pending that.

Because the second procedural issue, if your Honor decides that D.C. law applies and that the Anti-SLAPP provision applies, what Mr. Grunberg said is true, we would then ask -- which we did not need for this proceeding for the purposes of issues raised, we would ask your Honor for discovery on the issue of falsity, on the issue of actual malice, on the issue of whatever necessity we had to do to prove damages. I'm not sure that we have that because it's presumed damages because

it's libel per se, but also within the context of the Anti-SLAPP issue on the likelihood of success, we would also then for the first time address the issue that was raised by Mr. Levine in his argument but is not before your Honor in these two motions, and that is the liability for what we contend is a republication in the second article.

That issue has not been briefed, and it would be part of the Anti-SLAPP motion; not necessarily one subject to discovery, but your Honor would look at it and decide whether we had a likelihood of success on the issue of falsity with respect to article number two. We haven't briefed that before the Court at this point in time. Their comments on republication were only contained in their reply brief. They did not move to dismiss under 12(b)(6), contending that article two is not capable of a defamatory meaning.

THE COURT: I thought they moved to dismiss the entire complaint.

MR. WOOD: Only on arguably three grounds, the judicial proceedings privilege, opinion, and fair comment. They did not move -- I think Mr. Levine will acknowledge this, they did not move on the issue of whether the second article is capable of a false and defamatory meaning in the true sense of it being either a republication or in the sense of whether we need to brief it as an independent allegation of defamation on the face of it without it being a republication. That's not

part of the motion as I understand it and as it was briefed.

THE COURT: OK. Well, I will let them respond on that point, and if there's anything else you would like to reply -- we should finish up. If there's anything else that you would like to reply to briefly, you may.

MR. LEVINE: First on the last point, as your Honor pointed out, and I think Mr. Wood agrees with this, we have moved to dismiss as to what they call the republication and we call the statement on the grounds that if the petition itself is privileged and opinion, then there is no cause of action with respect to the statement/republication.

On the separate issue whether it is a republication in the first place, they took that position in their opposition to our motion, and we responded to it in the reply brief. I think that issue is fairly before the Court. It may subsume the issue of whether the statement is independently capable of defamatory meaning, or it may not, but I don't think -- our point is that it's not a republication. So that's our position on that.

I just want to clear up a few things Mr. Grunberg said that are worth clearing up. One is Mr. Grunberg is wrong about the AroChem case on two grounds. First, in the AroChem case the Court applied the law of neither plaintiff's nor defendant's domicile, it applied the law of the place where the defamatory statements were made, which in that case was

California.

He's also wrong that the D.C. Anti-SLAPP statute does not provide immunity. It is very clear from the legislative history of the D.C. Anti-SLAPP statute that that is exactly what the D.C. counsel was up to in providing an immunity to people who speak about matters of public concern, and I call the Court's attention to the Farah case and the Sherrod case which both make that point very clear.

Clarification on the Nevada Anti-SLAPP statute. I know your Honor is familiar with the New York statute. The Nevada statute is not like the New York statute, it's much broader. And if we did -- if the Court did determine that the D.C. Anti-SLAPP statute didn't apply, we have reserved it, our rights in our briefs, in both briefs, to argue that the Nevada Anti-SLAPP statute is different, not at all like the New York statute.

On the issue of hyperlinking, I want to make a couple of points in response to what Mr. Grunberg said. Mr. Grunberg is not crediting all of the cases we cited in our briefs with respect to the use of hyperlinks in opinion cases. It's true that a couple of them are New York cases, but several of them are cases from other jurisdictions. The Agora case is a Maryland case, the Nicosia case is a Florida case -- sorry, a California case, and the Redmond case is a California case.

And with respect to their overarching point that your

Honor should not credit the hyperlink because you can't assume that people will go to the link, and that in fact most people won't, that is not what these courts are holding, your Honor. I call your attention specifically to the court in the Nicosia case, and that involved an internet posting that directed readers to specific articles and provided a hyperlink for immediate access to those articles. The Court said, "These articles were at least as connected to the posting as the back page of a newspaper is connected to the front."

THE COURT: What case is that?

MR. LEVINE: Nicosia, N-I-C-O-S-I-A, 72 F.Supp.2d 1093.

And then two other very quick points. One is on the question that you asked about Mr. Jacobs and whether there was anything in the record that would show that Mr. Jacobs' bone fides were in question, it's important to point out I think two things. One is at the time that the petition and the statement were both posted on our Web site, the only thing in the judicial record in the Nevada litigation relating to these issues was the Jacobs declaration. There was nothing in there suggesting that what he said was false or that he didn't have bone fides.

In fact -- and this is a very important point that we didn't touch on -- there have been, as your Honor knows from our brief, lots of proceedings in the Nevada litigation about

the issue of whether documents that should be available to Mr. Jacobs to show these prostitution allegations were in fact accurate have been withheld -- improperly withheld from the Nevada court, and in fact whether they have been destroyed. And that speaks not so much to Mr. Jacobs' bone fides but Mr. Adelson's bone fides.

And if we get to the point -- this is the point Mr. Wood just made -- if we get to point where we are talking about the second phase of this, if your Honor doesn't grant our motion on one or another of the grounds currently before you, we do think the proper course would be to stay further proceedings on what they're calling the second phase of the Anti-SLAPP motion, specifically with regards to falsity, until these proceedings in Nevada with respect to the document instruction issues have run their course. Because if in fact it turns out, as it appears to be the case, based on the sworn testimony and the evidentiary hearing already held in Nevada, that Mr. Adelson's companies lost, or perhaps worst, the hard drive of Mr. Jacobs' computer so that the evidence that he claimed was there that would substantiate the prostitution allegations no longer exists, then there should be a real question in the Court's mind about whether at the very least they can carry their burden of proving falsity, and depending on what turns up in the Nevada litigation, whether or not they have engaged in the kind of willful misconduct that would

constitute a fraud upon the Court.

THE COURT: I don't know that it would be fraud on this Court. I see the issue as possibly going to the other point you raised about whether there would be an evidentiary basis to show falsity. In any event, has Jacobs in that case or in the Florida case retracted that statement --

MR. LEVINE: He has not.

THE COURT: -- about prostitution?

MR. LEVINE: He has not. And we cited at some length in our brief the answer that Mr. Jacobs filed in the Florida case in which he responds to these two e-mails that magically appeared some time later showing that -- purportedly showing that Mr. Adelson did not approve of prostitution.

THE COURT: The documents that led -- that Mr. Dershowitz showed to defendants and the documents that led the DCCC to recant and apologize, those were those e-mails that supposedly said -- supposedly provided evidence that what Jacobs said was untrue?

MR. LEVINE: So glad you raised that issue, your Honor, because I wasn't going to volunteer them, but since you raised them, number one, Mr. Dershowitz never showed us any documents ever. That is absolutely false, never happened.

Second of all, the DCCC statements that were retracted, it's very interesting that in their briefs they talk about the fact that the DCCC retracted but they never tell you

what the DCCC said in the first place. The DCCC didn't purport to report on allegations that were made in the lawsuit and claim that because these allegations have been made the funds had been tainted, they made flat-out affirmative statements that Mr. Adelson approved prostitution with no qualifications, no hyperlinks, no cites to anything else to point out -- to say they were reporting on a judicial proceeding. Totally different situation and not analogous to this one.

But to get back to your other question, your Honor, I am assuming that what they are referring to are these two emails that magically appeared down the road after the petition was online, after the statement was put up, and only later submitted of record in the Nevada proceeding.

Just one quick point. If your Honor does see fit at the end of the day to hold that D.C. law applies and to hold that we are entitled to prevail under the D.C. Anti-SLAPP statute, I would like to point out to the Court that the D.C. Anti-SLAPP statute provides for discretionary award of attorneys' fees to the defendant.

This is a -- and we tried to submit evidence in this regard in support of this aspect of our application under the SLAPP statute. This is a case brought by an extremely wealthy individual of unlimited resources against a small nonprofit organization. It is a case in which the plaintiff has a reputation for engaging in burdensome and abusive litigation,

and it is a case in which he is seeking or purports to seek not less then $10 million in compensatory damages and not less than $50 million in punitive damages. This is exactly the kind of case for which the D.C. Anti-SLAPP statute was enacted, and we think if the Court grants the motion we would be entitled to the award of attorneys' fees.

MR. WOOD: May I briefly have a comment?

THE COURT: Sure.

MR. WOOD: I just think it's wrong to impugn Alan Dershowitz without the facts. Alan Dershowitz is one of the most respected attorneys on constitutional law in this country and fought for the cause of Jewish rights and protection of Jewish American citizens and abroad. Mr. Dershowitz did not -- as I understand it, did not give the actual e-mails to the NJDC because they had not yet been filed of record in the court. But he, with his standing, told these gentleman they existed and he had seen them, and we contend they were entitled to believe Alan Dershowitz and had no reason to believe that Mr. Dershowitz would misrepresent the truth to them.

They were subsequently filed in the court. They did not magically appear. They were not given for precise reasons. They were then filed by the attorneys in Nevada to substantiate that in fact Mr. Jacobs knew years ago when this issue came up that it had been quickly investigated and he was told that it was absolutely false, that there was no change whatsoever in

the no tolerance policy that existed in the Las Vegas casinos.

The only other point I make, your Honor, is on this issue of republication, they raised it in a footnote contrary to the body of their motions where they listed the grounds upon which they were moving. And they concede in their footnote that even if it constitutes a republication, the privileges that protect the petition that they did assert would give it protection. I don't disagree with the latter, but what I would ask is if the Court feels that it does want to address the issue of whether article two is a republication, given that we did not address that in our response papers but did only do what we had done before and referred to it as a republication without arguing the merits, that we would be given an opportunity to supplementally brief that in some short order, concise fashion so we have the right to get our positions of record with respect to whether article two is actionable as a republication or otherwise.

THE COURT: OK. Thank you all very much. This has been helpful. I appreciate your arguments today and your excellent briefing of these issues, and I am going to get to work and I will be ruling as soon as I can.

MR. WOOD: Happy holidays.

MR. LEVINE: Thank you, your Honor.

THE COURT: Thank you.

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